THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KOLOLO

CORAM :(KISAAKYE, MWANGUSYA, TIBATEMWA-EKIRIKUBINZA, MUGAMBA JJ.S.C, TUMWESIGYE AG.JSC)

CRIMINAL APPEAL NO.02 OF 2017

DAVID CHANDI JAMWA ::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA ::RESPONDENT

(Appeal arising from the judgment of the Court of Appeal at Kampala in Civil Appeal No.77 of 2011, before Kavuma DCJ, Opio-Aweri and Kakuru JJA dated 15th January 2018.)

JUDGMENT OF THE COURT

The facts of this case as found by the trial judge and accepted by the Court of Appeal are that on the 20th April 2005, National Social Security Fund (NSSF) wrote to Standard Chartered Bank Global Markets, which was its primary dealer, requesting it to conclude the Treasury Bond Auction worth Shs. 13,999,860,498/= with Bank of Uganda. Thereafter it had invested in Bonds from Bank of Uganda on 20.05.2004 under the Treasury bond FXD2/2005/3. A cheque No.100250 was effected to Standard Charted Bank for the above amount.

The details of the bonds invested in were as follows:-

Period/years	Costs.(Shs)	Maturity valve (Shs)
3 years	4,999,968,596=	5,627,300,000=
3 years	2,999,959,188=	3,417,900,000=
3 years	2,999,974,732=	3,438,800,000=
3 years	2,999,957,982=	3,459,800,000=

The letter already related to was signed by Mr. Joshua Karamagi (Chief Financial Officer) and Mr. Martin Bandebire (Corporation Secretary) on behalf of NSSF.

At the 175th meeting held on 26th July 2005 under Minute No.268 the Management Investment Committee of NSSF resolved that Shs.16 billion be invested in Treasury bonds.

However, NSSF managed to invest only Shs. 12 billion in Treasury bonds under certificate code FXD 4/2005/3, with maturity date of 24th July 2008 as follows;

Period/Years	**Cost(Shs)**	**Maturity(Shs)**
3 years	4,000,033,338=	4,392,563,390=
3 years	4,000,028,188=	4,501,868,275=
3 years	3,999,972,879=	4,613,131,278=
3 years	12,000,034,405=	13,507,562,943=

In November 2005, the Bank of Uganda invited holders of the Treasury bond FXD 5/2005/3 (old bond first issued on 1st July 2004) to participate in the conversion of Shs. 40 billion (face value) of the bond in exchange for 2 years 10% coupon interest Treasury Bond FXD6/2005/2(New bond) at the cost of Shs 93.469 for a face value of Shs.100 generating a yield of 13.85%. The issue date of this Treasury bond was 1st December 2005 and the maturity date was 29th November 2007. The Holder of the FXD5/2004/2(NSSF) were to convert all or a portion of their holding of the FXD 5/2004/2 to the FXD 6/2005/2 Treasury bond.

The Management Investment Committee of NSSF at its meeting held on 30th November 2005, reviewed the offer and agreed that the transaction be executed. The face value of the bond that NSSF surrendered was Shs. 19,390,700,000/=

The then acting Managing Director, Mr. Martin Bandebire, and the Chief Finance Officer, Mr. Joshua Karamagi issued cheques of serial No.100292 and 100293 totalling to Shs. 18,124,293,383/= to the Manager of Standard Chartered Bank Global Markets.

On the 31st January,2007 the then Minister of Finance, Planning & Economic Development (Dr. E. Suruma) appointed the

appellant as Managing Director for NSSF on a contract of 3 years. He was to be the Chief Executive Officer of NSSF.

On the 1st February, 2007 the appellant wrote back to the said Minister of Finance accepting the offer of appointment to the position of Managing Director of NSSF. He assumed office on 2nd February, 2007.

On the 3rd October,2007 the appellant as Managing Director wrote to the Treasury Crane Bank Uganda Limited giving them mandate to sell 2 years bonds whose face value was Shs. 39,468,800,000/=

On the 4th October 2007, the Investment Analyst Officer of NSSF Mr. Stephen William Kizito wrote to the Managing Director (appellant), through the Chief Finance Officer, an internal memo requesting for authorisation to sell the same bond whose cost value was 34,999,847,382/= at an agreed price of Shs. 36,747,739,894 to Crane Bank Uganda Limited. Mr Kizito stated that the sale provided an effective weighted average of 15.25% to the fund and overall profit of Shs.539 million. The appellant approved the above request on the same day.

On the same day of 4th October 2007, the Managing Director Crane Bank Ltd (Mr. Ali Reza Kalan) wrote back to the appellant acknowledging that he had received his letter and that they had identified buyers for the same. Relatedly he sent him a schedule containing offers received of that transaction to be executed on 5th October 2007 for the 3 years Treasury bonds. He attached the sale confirmation forms.

On the 5th October,2007, upon approval by the appellant of the said transaction, the accounts section was instructed to process a cheque payable to Standard Chartered Bank, their primary dealer, for the value of proceeds of Shs. 36,747,739,894/= to be transferred to Crane Bank.

On the 2nd November, 2007, the appellant wrote to the Treasury Crane Bank Ltd giving them mandate to sell the 2-year Treasury Bonds whose face value was Shs. 9,722,400,000/= a schedule of

the bond comprising this amount attached to the letter was as follows;

cert	Purchase price	Cost value(shs)	Maturity
FXD6/2005/2	94.5120	4,210,131,552	4,454,600,000
FXD6/2005/2	94.9160	4,999,985,048	5,267,800,000
Total		9,210,116,600	9,722,400,000

Again on the same day on 2nd November, 2007 the appellant, wrote another letter addressed to the Treasury Crane Bank Uganda Ltd mandating them to sell 2 years Bond whose face value was Shs. 19,390,700,000/= This transaction was concluded at the agreed price of Shs. 19,010,465,885 as seen below;

Cert	Purchase price	Cost valve(Shs)	Maturity
FXD6/2005/2	93.4690	18,124,293,383	19,390,700,000

On the 5th November,2007 the Managing Director of Crane Bank (Mr. Ali Reza Kalan) wrote to the appellant acknowledging receipt of his letters and also informed him that they had identified the buyers of the same. He gave him a schedule containing the offers for the above 2 bonds which were to be executed on the 5th November, 2007 and 6th November, 2007. The appellant was in addition sent the sale confirmation forms for his signature and stamping.

At the trial the prosecution submitted that the appellant abused his office as a Managing Director and caused a financial loss of Shs. 3,163,256,502/= to NSSF as follows

Face value of Treasury bond on Maturity	Price offered by Crane Bank Ltd	Occasioned loss
39,468,800,000/=	36,767,739,894=	2,721,060,106=
9,722,400,000/=	9,660,437,719=	61,962,281=
19,390,700,000/=	19,010,465,885=	380,234,115/=

Total loss		**3,163,256,502/=**

The appellant denied having caused any loss. He stated that the sale of the bonds was a result of a strategic plan that was approved by the Minister and that it was a collective, not individual, decision.

The appellant was indicted for the offence of abuse of office contrary to Section 11 of the Anti-Corruption Act and causing financial loss contrary to Section 20 of the same Act in the Anti-Corruption Division of the High Court. He was tried and convicted for causing financial loss and sentenced to 12 years imprisonment. He was also barred from holding any public office for a period of 10 years after serving the sentence. He was however acquitted on count one for the offence of abuse of office.

The appellant appealed to the Court of Appeal against both the conviction and sentence. The respondent cross- appealed against the acquittal on the offence of abuse of office.

The Court of Appeal dismissed the appellant's appeal and confirmed the conviction and sentence of the trial court. The Court of Appeal further convicted the appellant for the offence of abuse of office and sentenced him to a term of four years imprisonment. The sentences were to run concurrently. Hence this appeal.

The appellant's memorandum of appeal has 5 grounds namely;

1. **The Learned Justices of Appeal erred in law when they failed to correctly re-evaluate the evidence relating to the ingredients necessary to satisfy the charge of causing Financial Loss contrary to Section 20 of the Anti-Corruption Act,2009 and therefore occasioning a miscarriage of justice.**
2. **The Learned Justices of Appeal erred in law when they failed to correctly re-evaluate the evidence relating to the ingredients necessary to satisfy the charge of Abuse of Office contrary to Section 11 of the Anti-**

Corruption Act,2009 and therefore occasioning a miscarriage of justice.

3. **The Learned Justices of Appeal erred in law when they failed to properly consider the appellant's submissions in regard to the legality and severity of the sentence of Court of first instance.**
4. **The Learned Justices of Appeal erred in law when they upheld the Trial Court's conviction of the accused against anon-existent offence under the Anti-Corruption Act,2009 and so occasioning a miscarriage of justice.**
5. **The Learned Justices of Appeal erred in law in making/rendering a decision without the requisite Coram.**

During the hearing of the appeal, the appellant was represented by Mr. Peter Kabatsi together with Mr. David Mpanga while the respondent was represented by Mr. Rogers Kinobe, Senior Inspectorate Officer, and Mr. Philip Munaba, Inspectorate Officer, from the Inspectorate of Government.

We shall deal with ground 5 first. It concerns the validity of the judgment of the Court of Appeal and its disposal will determine whether or not it is necessary to go into the merits of the case.

Appellant's submissions

The appellant argued that the Court of Appeal delivered its judgment without the requisite quorum. It was submitted that **Article 135 (1)** of the **Constitution** requires a sitting of the Court of Appeal to be duly constituted with an uneven number not being less than three Justices. Furthermore, counsel referred to **Rule 33 (3)** of the **Court of Appeal Rules** which provides that:

> **"In criminal appeals, one judgment shall be given as the judgment of the court but a Judge who dissents shall not be required to sign the judgment."**

Counsel argued that the circumstances surrounding the delivery of the Court of Appeal decision from which this appeal emanates contravened the above provisions of law.

The circumstances are that the appeal was heard on 23rd October 2014 by a panel of three judges- Hon. Justice Kavuma (who was the Deputy Chief Justice then), Justice Opio-Aweri and Justice Kenneth Kakuru. On 15th January 2018, the judgment which was signed by Hon. Justices Opio-Aweri and Kakuru was delivered. However, on the date of delivery, Justice Opio-Aweri had been elevated to the Supreme Court and Justice Kavuma had retired.

Counsel argued that it cannot be ascertained whether indeed Justice Opio-Aweri signed the judgment prior to his elevation since his signature was never dated. It was posited that it could also not be ascertained whether Justice Kavuma had agreed with the judgment or dissented.

According to the appellant, the above circumstances meant that only one Judge on the quorum was left to deliver the judgment thereby compromising its integrity.

Respondent's reply

Whereas the respondent's counsel agreed that **Article 135 (1)** of the **Constitution** mandates the Court of Appeal to be duly constituted with an uneven number of 3 justices, he argued that the said constitutional provision is not applicable when it comes to writing judgments. He submitted that Rule **33** of the **Court of Appeal Rules** provides for a dissenting judge in a criminal trial not to sign the judgment and the Judge is not obliged to give reasons for dissenting. To buttress this argument, counsel also relied on the authority of **Kulata Basangwa vs. Uganda (SCCA NO.3 of 2018)** where this Court *inter alia* held that:

> **"There is no requirement for a dissenting judge to write a dissenting judgment... The absence of a third Justice's signature does not invalidate the decision of the court**

which was taken after a hearing of the case in accordance with the Constitution."

On the premise of the above authorities, counsel argued that the judgment of the Court of Appeal which was signed by two Justices on the panel formed the majority decision and is accordingly a valid judgment.

In rejoinder, the appellant's counsel submitted that the respondent did not appreciate the arguments raised and did not respond to the issue touching the facts of the case. Counsel referred this court to the persuasive Indian authority of **Surendra Singh and Others vs. The State of Uttar Pradesh (1954) AIR 194** where the court held that there was no valid judgment because the case was heard by a bench of two judges and the judgment signed by both of them but where it had been delivered by one judge after the death of the other judge who had signed.

Court's Consideration

We have considered the submissions made by both parties. In our considered view, a judge who has appended a signature on a judgment loses the right to change their mind as soon as they cease to be on the court. In the matter before us, Justice Opio-Aweri lost the authority to alter the judgment as soon as he appended his signature to the judgment before he ceased to be a Justice of the Court of Appeal. He is therefore bound by that judgment.

On the other hand, Justice Kavuma, DCJ who at the time of retirement had neither appended his signature on the judgment that was in place nor authored an independent judgment, ceased to have authority to do either as soon as he ceased to be a Justice of the Court. Consequently, in line with **Rule 33(3)** of the **Court of Appeal Rules** which provides that - **in criminal appeals, one judgment shall be given as the judgment of the court, but a judge who dissents shall not be required to sign the judgment.** Kavuma, DCJ is taken to have dissented from the

opinions of his colleagues (Kakuru and Opio-Aweri, JJA) who signed the judgment that was eventually delivered.

In cases where a judgment is reserved, it is not always the case that the day a judgment is signed is the day it is delivered. The import of ascertaining the day on which a judgment is delivered is that, that is the day on which the judgment takes effect. The fact that the date of signature and delivery of the judgment are different does not affect the validity of the signed document. What is important is that at the time a Judge signs the judgment, he/she is still a member of the court.

Indeed, in **Orient Bank Limited vs. Fredrick Zaabwe and Mars Trading Limited**, **Supreme Court Civil Application No.17 of 2007** this Court dealt with a similar issue in which judgment was delivered at a time when one of the Justices on the panel had retired from this Court. In that case also the applicant challenged the validity of the judgment. Citing **Rule 32 (8)** of the **Rules of this Court** which is in *pari materia* with **Rule 33 (8)** of the **Court of Appeal Rules**, this Court held:

> **"The Rule which envisions delivery of a reserved judgment by a Judge who did not sit at the hearing covers not only the scenario where the Judge who sat is temporarily absent but also covers scenarios where the judge is no longer available by reason of death or retirement. The only conditionality for the application of the Rule is that the judgment in question was written and signed by a Judge who took part in the hearing and deciding of the matter. The reason that prevents the Judge who wrote and signed the judgment to deliver it in person is irrelevant. The requirement for the judgment to be in writing and signed is to ensure its authenticity and validation of the judgment of the Judge making it. It is immaterial that such judge was prevented by death or retirement provided that at the time of the writing and signing, the Judge was a member of the court."** (our emphasis)

The authority of **Surendra Singh (supra)** cited by the appellant was considered by this Court in **Orient Bank Limited vs. Fredrick Zaabwe and Mars Trading Limited (supra)** and this Court declined to follow its reasoning. We see no reason for departing from this earlier position.

Further still, we take note of **Article 126 (2) (e)** of the **Constitution** which obliges courts to administer substantive justice without undue regard to technicalities. This Court in the case of **Banco Arabe Espanol vs. Bank of Uganda (SCCA No.8 of 1998)** cited the case of **Uganda Development Bank vs. National Insurance & anor (SCCA NO.28 of 1995-unreported)** with approval and stated as follows:

> **"In a case such as the present, as I have mentioned before in this judgment, there is, on the one hand, the necessity for the rules to be followed, and on the other, the need for courts to control their proceedings and not to be inhibited by the rules of procedure. As George, C.J, said in *Essaji v. Solanki* (1968) EA 218 at 222 the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights. Unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely, the hearing and determination of disputes, should be fostered rather that hindered. This, of course, does not mean that rules of procedure should be ignored. Each case must be decided on the basis of its own circumstances. In the instant case the grounds and affidavit evidence on which the learned trial Judge exercised her discretion in favour of the appellant have already been set out in this judgment."**

We acknowledge that there was inordinate delay in the delivery of the judgment to which we take exception. We also acknowledge there was non compliance with **Rule 33 (11)** of the **Court of Appeal Rules** which provides that a judgment be dated as of the

day when it is delivered. In our view none of the two errors is so fatal as to render invalid the authentic signature of a judge who had jurisdiction in the matter at the time he appended his signature. Further, from the record the of Court of Appeal the date on which the judgment was delivered is well known.

The two errors are the sort of technicalities that should not be allowed to prevail at the expense of substantive justice as envisaged by Article 126(2) (e) of the Constitution and well-articulated in **Banco Arabe Espanol vs. Bank of Uganda**(supra) and others referred to in that decision.

Ground 5 therefore fails.

On Ground 4, Counsel argued that the appellant was wrongly convicted for an offence which does not exist in statute. That Section 20 of the Anti-Corruption Act under which the appellant was charged does not include public bodies or institutions against which a person can cause financial loss.

Section 20 of the **Anti-Corruption Act** provides as follows:

> **Causing financial loss.**
>
> **Any person employed by the Government, a bank, a credit institution, an insurance company or a public body, who in the performance of his or her duties, does any act knowing or having reason to believe that the act or omission will cause financial loss to the Government, bank, credit institution commits an offence and is liable on conviction to a term of imprisonment not exceeding fourteen years or a fine not exceeding three hundred and thirty-six currency points or both.** (Emphasis of Court)

The appellant's counsel took issue with the reasoning of the Court of Appeal to the effect that the latter part of Section 20 is to be interpreted ***ejusdem generis*** to include insurance companies and public bodies as institutions on whom loss would be occasioned although they were omitted in the latter part of the Section. Counsel relied on the case of **Sgt. Shaban Birumba and Longi Robert vs. Uganda (SCCA No.32 of 1989)** and argued

that courts cannot interpret penal provisions *ejusdem generis* or purposively. He said that similarly courts cannot add words to penal provisions but that provisions ought to be interpreted strictly. He stated that where there is an ambiguity surrounding the provisions whether as a result of implied repeal or careless language on the part of the draftsman benefit of doubt should be given to the Accused. Counsel submitted that if there is an ambiguity as to whether the penal provision in Section 20 applied to insurance companies and public bodies, that ambiguity should be resolved in favour of the appellant. Counsel argued that to interpret the section the way Court of Appeal Justices did contravened long settled principles of interpreting penal provisions under **Article 28 (12)** of the **Constitution**. That Article provides:

> **"Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law."**

The respondent on the other hand argued that although the words "insurance company" and "public body" were left out in the latter part of the provision, there is nothing in the Section to indicate that the omission was deliberate to give the Section a completely new and different meaning. He added that there is no expression that the lack of inclusion of the word "public body" in the latter part of the provision was meant to delete the application of the Section on persons employed by a public body.

Furthermore, the respondent's counsel argued that National Social Security Fund being a public body established by an Act of Parliament rightly falls under Section 20 (supra).

Court's consideration

In the present case, the court is faced with interpretation of a single provision (Section 20) within the same statute (the Anti-Corruption Act).

The appellant's counsel particularly faulted the Court of Appeal for applying the ejusdem generis rule of interpretation to Section

20 (supra). The question to be addressed is: ***Does the canon of ejus dem generis apply in interpreting Section 20 of the Anti-Corruption Act?***

Ejusdem generis is a rule of statutory interpretation applied to a class of things which are followed by general wording that is not itself expansive. The interpretation of the general wording is restricted to the listed items or class of things.

The appellant's argument is inclined to the "omitted case" canon of interpretation which is to the effect that nothing is to be added to what the text states or reasonably implies; a matter not covered is to be treated as not covered. (See: Antonin Scalia and Bryan A Garner, *Reading Law*, 2012).

Furthermore, the appellant's argument is also in line with the presumption that Parliament will use the same or similar language throughout an Act when meaning the same thing. But in the persuasive authority of **Cramas Properties Ltd vs. Connaught Fur Trimmings Ltd [1965] 2 All ER 382 at Page 385** Lord Reid noted that this presumption is only a presumption and one must always remember that the object in construing any statutory provision is to discover the intention of Parliament and that there is an even stronger presumption that Parliament does not intend an unreasonable or irrational result.

Applying Lord Reid's persuasive reasoning, we deem it irrational to interpret Section 20 in a strict sense as the appellant argued. It is improbable that the Legislature would list a class of institutions against whom financial loss would be caused and in the latter part of the same provision deliberately narrow that class by leaving out some of the aforementioned institutions.

The essence of the offence created by the impugned section is to punish individuals who in their capacity as workers of the employing institutions named therein knowingly cause financial loss to their employers. The Section specifically mentions the employing institutions whose funds it protects.

In determining who can be punished under the section, court must be guided by the purpose for which the provision was enacted. To argue that although the Legislature found it necessary to protect the funds of Government, banks, credit institutions, an insurance company or a public body, an employee who causes loss to a public body can nevertheless not be punished as would their counterparts in the other aforementioned institutions because of the omission of the word "public body" in the latter part of the section would produce an irrational result.

Arising from our reasoning above, we find that the offence for which the appellant was convicted existed under the Anti-Corruption Act.

Ground 4 therefore fails.

Grounds 1 and 2 were argued together.

Appellant's submissions

Counsel for the appellant submitted that the Court of Appeal as a first appellate court failed in its duty to re-evaluate the evidence and test it against the conclusions of the trial court. According to counsel re-evaluation of evidence is not mere mention of the evidence and the conclusions but rather it is an analysis of all the evidence tendered.

It was argued that the Court of Appeal only cited the law on the duty of a first appellate court to re-evaluate evidence but did not carry out that duty. Counsel submitted that the judgment of the trial court was devoid of logic and reason because after reproducing portions of evidence that were clearly in favour of the appellant, the judge found him guilty without applying the evidence as a whole against each element.
The Judge was faulted for adopting and applying a test unknown to criminal law termed "**a nosy but intelligent onlooker"** to make a finding of guilt thus occasioning a miscarriage of justice.

Counsel added that the Justices of appeal fell into the error of following the "nosy onlooker" by asking questions about whether there was need for liquidity. He said that was not the issue because the witnesses had testified that there was a need for strategic realignment to get a high yield.

Counsel submitted that there was evidence on record of prosecution witnesses testifying to the fact that at all times the appellant acted with the knowledge and approval of the Board and the Minister when he mandated the sale of the bonds to Crane Bank Limited. He said that the trial judge found that the appellant did not act arbitrarily yet found that he had knowledge to cause financial loss under count 2.

Counsel submitted that there was nothing sinister or illegal about selling bonds before maturity. He contended that there was no evidence of a corrupt intent in the impugned actions by the appellant. He said that the letter dated 4th October 2017 by the Investment Analyst to the Chief Investment Officer (PW3) could only have been written after Crane Bank had received a price quotation for the bonds. He stated that the letter signed by the appellant on 3rd October, 2017 to Crane Bank was to solicit a price quotation upon which an investment analysis could be made. Counsel contended that the fund gained profit by way of interest and that this was known to the appellant and all members of management, board and the minister who authorised the sale of the bonds.

Counsel submitted that the Court of Appeal did not consider the fact that no evidence was adduced to show that NSSF recorded a loss on its finances because in fact as testified by PW7 such a transaction would not be recorded as loss. He stated that the sale was not prejudicial to NSSF.

Counsel submitted that there was a difference between opportunity cost and loss. He said that it was not the case of a Managing Director selling bonds before maturity putting up money in his pocket and walking away. He relied on cases of

Kassim Mpanga vs. Uganda, SCCA. No.30 of 1994 and Godfrey Walubi & Anor, CACA No.152 of 2012.

He stated that the opportunity cost that a person makes in a business decision looks at two options and opts to try and make more money by moving out of this asset into another. He said that that is exactly what the Strategic Planning Committee, the Board, the Minister approved. To move out of one set of investments into another. He added that this is what PW3 Isabirye testified to.

On abuse of office, counsel submitted that the appellant was simply implementing a Board and Ministerial position of the fund and as such he did not act arbitrarily. He was emphatic that the appellant mandated Crane Bank to sell the bond, with approval and knowledge of the Board.

Counsel submitted that the Strategic Planning Committee, the Board of NSSF and the Ministry of Finance were all involved in determining that there was a need to realign the asset mix of the fund in order to increase the yield of the fund to the savers. He said that the initial evaluation with the trial judge was on count 1, abuse of office. He said that the process was not arbitrary and that later on to find it arbitrary would be an assault on common sense.

Counsel contended that the initial finding of the court of first instance was correct. He said that there was no arbitrary act but that there was an institutional decision. Evidence of prosecution witnesses number 1, 3, 4 and 7 concurred that there was a process which involved a number of people and was institutional, he added. He concluded that as such it wasn't an arbitrary individual action of the appellant.

Counsel submitted that prosecution witness No. 7 an Investment Analyst was very clear there was a letter inviting Crane Bank to find buyers or bids and the letter then caused Crane Bank to respond with an offer. He added that the offer was analysed by the Analyst who then asked for an approval which was given. He

noted that at page 863 of the record there is evidence of the memo from the investment analyst and that there was no problem with the sequence.

Counsel submitted that there was an invitation to treat inform of a letter to Crane Bank seeking for buyers. Then an offer from Crane Bank stating that they would buy and stating the amount of money. He added that there was then an analysis of that offer and the letter dated 4th October, 2007 is an approval by the MD (the appellant).

Counsel submitted that had the Court of Appeal revaluated the evidence, it would have noted that from cross examination of PW6, the investigating officer and the testimony of the appellant that none of the board members or other members of NSSF management team, including those who signed the sale confirmation forms, were investigated, charged and tried. He stated that this showed that their actions were not corrupt or criminal, as were actions of the appellant.

On causing of financial loss, counsel submitted that prosecution witnesses testified that NSSF did not suffer loss to warrant criminal prosecution. Counsel invited court to consider the evidence of PW3 who confirmed that the proceeds from the sale of the bonds were invested in fixed deposit foreign exchange accounts and that they yielded more interest.

Counsel contended that the Court of Appeal speculated when it stated that had the appellant waited, he would still have invested and submitted that the testimony of Pw7 that the proceeds from the sale of bonds were used to buy foreign exchange in dollars and pounds which were used to invest in foreign equities in global funds should have been taken into account.

Counsel contended that the Court of Appeal failed to re-evaluate the case and deal with that evidence which was on record. He said that the Justices of appeal in determining loss relied on a Ghanaian case of **The Republic vs Ibrahim Adam & Ors Suit No.FT2/2000 (unreported per. AFREH.JSC)**. He stated that the

case was not put to counsel to address the Court of Appeal and it was not among those which were cited by the respondent. He noted however that another issue in that case which is cited by the Justices of Appeal at length is correct, regarding the definition of loss, but he said the facts were different.

Counsel argued that the amounts had been invested in a legitimate secondary market, which can be used to move from one kind of investment into another. He contended that a business decision was taken and that there was evidence that profit was made.

Counsel cited the authority of **Godfrey Walubi & Anor vs Uganda, Court of Appeal Criminal Appeal No.152 of 2012** as good authority on what constitutes loss.

Respondent's reply

Counsel for the respondent submitted that the learned Justices of appeal properly evaluated the ingredients of the offence of causing financial loss. He said that Mr. Grace Isabirye, the Chief Investment /Finance officer who testified as PW3 stated that the various bonds were solely sold by the appellant to Crane Bank and accordingly, the purchase documents were attached to prosecution exhibits PE4, PE5 and PE6. He said that all these documents indicate that the appellant was the person who solely authorised the sale and determined the price when the Crane Bank offered to buy. Their responses were admitted as exhibit PE7, he added.

Counsel submitted that PW4, Mr. Ali Reza Kalan, the Managing Director of Crane Bank testified and identified the various bonds purchased by the Crane Bank, their costs as well as maturity dates. He confirmed that the value of bonds at maturity was more than the value sold before maturity. He further confirmed that during the transaction they looked into the most profitable figures from buyers. He said that they wrote to the appellant on 4th October ,2007 proposing to buy what they were mandated to sell.

Counsel submitted that without involving the Standard Chartered Bank, the primary dealer of NSSF, to conduct public auction or referring the matter to the technical organs such as the NSSF Board, Management Investment Committee or a technical officer such as the Chief Investment Officer, the Investment Analyst or Auditor, the appellant on the same day of 4th October 2007 unilaterally replied accepting to sell the bonds at **UGX 36,767,739,894/= (Shillings thirty six billion seven hundred sixty seven million seven hundred thirty nine thousand eight hundred ninety four)** below the maturity value by UGX,**2,271,600,106/= (shillings two billion two hundred seventy one million, six hundred thousand, one hundred and six)**

Counsel submitted that while the appellant maintained that the money realised from the sale was reinvested in fixed deposit and thus attracted more interest, no evidence was tendered to prove the same. He added that the sale was appellant's personal decision not backed by any authority of NSSF.

Counsel submitted that the sale of bonds was not justified because PW1, Mr. Stephen Kaboyo the Director /Manager in charge of financial markets at Bank of Uganda stated that in secondary markets, an investor is advised to sell bonds to a party that pays the highest price and buys from the party that gives the lowest task price. He said that primary dealers are required to continuously lay a market. He added that the appellant unilaterally handpicked Crane Bank to the detriment of other potential buyers of the bond. He stated that ordinarily such sale should have gone through the Standard Chartered Bank, the registered primary dealer of NSSF who would publically auction the same.

Counsel submitted that the appellant determined the mode of sale, the buyer and the price without subjecting the process to competitive bidding. He said there was no risk that NSSF would not get the predetermined amount. He submitted that according to PW1, once maturity of the bonds falls due, there is an

automatic process where Bank of Uganda calculates both the coupon and discount and the money is remitted automatically onto the primary dealer bank account for the investor's account to be credited. He added that upon maturity there is a rate which caused the future cash flows from the coupon interest one makes. Counsel submitted that the price upon maturity was known to the appellant the moment he quoted the prices to Crane Bank in all his mandates to sell, marked PE4, PE5 and PE6.

Counsel for respondent submitted that all the witnesses including the appellant testified that these bonds were meant to mature between two to three years. He said they had spent more than two years before the appellant was appointed in February,2007 according to his appointment details admitted as exhibits PE1 and PE2. He submitted that the appellant had just spent 8 months at the job and the remaining periods to maturity were 23 to 254 days. He said that according to the testimony of PW1 it was the purchaser, Crane Bank, who was then entitled to full value upon maturity and it got difference of Shillings 3,163,256,502/= in the remaining 23 to 254 days.

Counsel submitted that **Black's Law Dictionary 5th Edition at page 851** states that loss is a generic and relative term which signifies the act of losing or the thing lost. He said that it is not a word of limited, hard and fast meaning and that it has been held to be synonymous with or equivalent to **damages, damage, deprivation, detriment, injury and privation.** He added that indeed NSSF lost the said Shs. 3,163,256,502/=

Counsel submitted that the right to subject investment decision to the Management Investment Committee(MIC) was not optional but rather mandatory because the NSSF board enacted policies such as Investment Policy 2007(P11) and the Financial Regulation Manual 2006(PE9) in a bid to maintain efficient performance of the affairs at NSSF. He said that it was a pre requisite for the appellant to seek the approval and guidance of

the Management Investment Committee before investing the said securities in order to maximise profits.

Counsel submitted that the internal memo admitted as PE12 dated 4th October 2007 from Pw7, Mr. Kizito William, appears to be consulting whether or not it was viable to sell those particular bonds in issue to Crane Bank, since the mandate to sell the bonds had already been given by the appellant on 3rd October, 2007. He added that the analysis of Pw7 a day after the mandate was given, could not have been a basis to set the price for the bond.

Counsel submitted that the said memo instead of being channelled through the Chief Investment Officer went straight to the appellant who approved the sale the very day of 4th October 2007 after he received the memo which left out input of the Chief Investment Officer.

Counsel contended that Grace Isabirye, the Chief Investment Officer, testified that his signature on the transaction was mere evidence of sale of bonds to Bank of Uganda. Counsel said that Isabirye testified that according to policy on investment, all the investments would traditionally go through Management Investment Committee where the decision to invest would be made.

Counsel observed that if the disposal of the bonds had gone through the Management Investment Committee, NSSF would have rejected the Crane Bank's offer because the Management Investment Committee under investment policy No.5.3 at page 849 are mandated to set and agree on the minimum returns that given investments need to yield.

Counsel submitted that the Justices of the Court of Appeal observed that the appellant bypassed the Standard Chartered Bank, the NSSF registered primary dealer, which would have objected to the sale or secured a better price.

Counsel argued that though the appellant alleged that the Minister authorised the premature sale of bond on the 5th April

2007, there is no proof of the said authorisation and that the minister's recommendation did not waive the provisions of the NSSF Act. He added that under **Section 30 of the NSSF Act** all investment decisions must emanate from the board.

Counsel submitted that the appellant did an arbitrary act of handpicking Crane Bank to purchase the bonds which was prejudicial to the interest of NSSF and its savers because **section 4(3) of the NSSF Act** mandates the Board to ensure that there is secure, profitable and effective financial management of the funds for the benefit of workers in particular and the country at large.

Counsel submitted that NSSF was not in dire need for the funds, recalling that PW6, Mr. Mugambwa Robert, testified that when he checked through the accounts of NSSF it was very liquid and there was no need to sell treasury bonds prematurely.

Citing the case of **Kassim Mpanga vs Uganda, Criminal Appeal No.30 of 1994,** counsel stated that it is not a requirement under the Section that the arbitrary act prejudicial to the interest of an accused person's employer, which the accused had done in abuse of authority of his office, must also have caused a loss to his employer.

Appellant's Submissions in Rejoinder

Counsel for the appellant submitted that the decision to sell the bonds as seen in the testimony of PW3 was taken by the Strategic Planning Committee of the Board, extracted from EXCO sitting in Mweya where it was resolved to realign the fund's investments portfolio. He said that the appellant was charged with immediate implementation of the resolution by authorising the sale of the bond and reinvesting them.

Counsel contended that the decision to sell the treasury bonds was adopted by the Board of NSSF as seen in the testimony of Pw3 and was approved by the Minister of Finance. He said that PW2, PW3 and PW7 all testified that there was no way the appellant would have sold the bonds singularly.

Counsel submitted that the amount that was guaranteed at the maturity date is immaterial because of the nature of the bonds market business that allows for the treasury bonds to be legitimately sold before the maturity date.

Counsel noted that PW7 in cross examination testified that the money earned from the sale of the bonds was reinvested in interest bearing fixed deposit accounts in licenced financial institutions in Uganda and that as such there was no money taken out of the fund and no loss to the fund.

Counsel concluded that the appellant did not and could not have arrived at the decision to sell the treasury bonds singlehandedly and in the premises prayed that this court acquits him of the offense of abuse of office as the High Court rightly did.

Court's determination

We have carefully considered the submissions by both counsel. Before we go into our own analysis of the appeal there are submissions by both counsel on which we feel we have to put the proper position of the law on record.

Counsel for the appellant faults the Court of Appeal for having relied on the persuasive authority of **The Republic vs. Ibrahim Adam and Others** (supra) because according to him the case was not put to counsel to address the court and that it was not among those which were cited by the respondent.

We need to emphasise that court is not restricted in its scope to do research and use whatever authority is at its disposal to resolve a matter before it. Neither is it bound by submissions of counsel. As such the mere fact that the authority was nor raised and discussed during the trial would not preclude the court from relying on it so long as it was relevant.

On his part counsel for the respondent submitted that although the appellant had maintained that the money realised from the sale was reinvested in fixed deposit and thus attracted more interest no evidence was tendered to prove the same. The

suggestion that no evidence was tendered to prove the same would tend to shift the burden of proof to the appellant.

Generally, it is a cardinal principle of our criminal law that throughout the trial the burden to prove the case beyond reasonable doubt lies on the prosecution and this is one such a case. The prosecution ought to discharge that burden. With those clarifications we proceed to discuss the appeal itself.

The appellant was acquitted by the trial court on count 1 as earlier stated in this judgement. The state cross- appealed against his acquittal. The Court of Appeal convicted the appellant for the offence of abuse of office and held as follows: -

> **"As already stated earlier in this judgement before a court convicts any person under section 11 of the Anti-Corruption Act for the offence of abuse of office, it must be satisfied by the evidence that the accused abused his/her office when he or she committed an arbitrary act, prejudicial to the interest of his employer. In this particular case the arbitrary act was stated to be the sale of bonds before their maturity date to Crane Bank Limited causing unfavourable price variance to the prejudice of NSSF.**
>
> **Evidence required to prove count one abuse of office and count two causing financial loss overlap. What is peculiar to count one is that act must have been an arbitrary one.**
>
> **The prosecution set out that act of selling the bonds before maturity was unreasonable and arbitrary. The appellant contended that it was a collective act authorised by the minister and done in good faith in the normal cause of business...**
>
> **There is evidence on record to show that the appellant mandated that the sale of the bonds on 3rd October 2007 before the request to sell them had been received from the Investment analyst. That letter requesting for**

permission to sell was written on the 4th October 2007. By then the appellant had already received a suggestive price from Crane Bank which was by coincidence the same as that arrived at by the Investment analyst.

That the appellant mandated Crane Bank to sell the bonds on behalf of NSSF. In doing so the appellant by-passed Standard Chartered Bank, the NSSF's registered primary dealer. There was evidence that Standard Chartered Bank would either have objected to the sale or secured a better price.

The bonds were sold to the cheapest buyer, Crane Bank Ltd, which bank had first presented itself as secondary dealer and as such as agent of the bonds holder NSSF. There was an apparent conflict of interest in favour of Crane bank to the detriment of NSSF which the appellant ought to have known. The treasury bonds had been purchased in 2005 through a resolution of NSSF investment committee, however the sale was singlehandedly authorised by the appellant without the committee's resolution.

The treasury bonds were sold a few days to their maturity date at a time when the NSSF was in no need of liquid cash. The evidence on record is that NSSF had a lot of liquid cash on its accounts and was not in need of the money at the time the bonds were sold. At all material time the price of the bonds upon maturity was well known to the appellant and was guaranteed.

Although the minister had advised the Bond to raise money in the financial year 2007/2008, there was no evidence that at the time the bonds were sold in October 2007, NSSF was in such dire need of money that it could have not waited for a few weeks for the bonds to mature. The evidence on record is to the contrary.

We find that the appellant therefore abused the authority of his office when he acted the way he did as already outlined above.

We find that there was sufficient evidence on record to prove that the appellant acted arbitrarily when he authorised the sale of the bonds in question before the maturity date and we hold so."

We find that the Court of Appeal after re-evaluation of evidence correctly found that the appellant did an arbitrary act of selling the bonds before maturity which was prejudicial to his employer NSSF and that as a result NSSF suffered loss. Further the appellant did not follow the proper procedure, the internal mechanism, before mandating Crane bank to sell the bond. There is no evidence, as correctly found by the Court of Appeal, that the Minister of Finance approved the sale of the bonds before maturity. What the Minister approved was NSSF Budget for 2007/2008. There was no Board resolution to that effect either.

On count two of causing financial loss, we have carefully considered the arguments of both counsel. We note that the Court of Appeal after re-evaluation of evidence on the record stated as follows: -

"We are in total agreement with the learned trial judge that the sale of the bonds before their maturity date occasioned financial loss to NSSF. Even if there was justification for the sale and we have found none, the sale of bonds before maturity would still have constituted a loss to the holder.

Circumstances may require a bond holder sells before maturity. That in itself does not take away his /her loss. Such loss may be justified or make business sense depending on the circumstance of each case. Nonetheless it remains a loss.

The appellant was very much aware that the sale of the bonds before their maturity would occasion loss but he authorised the sale anyway.

From the evidence of Kaboyo, a Director with Bank of Uganda, we find that bonds are sold and purchased below their value before maturity and upon maturity they return to their full face value. The appellant was therefore at all times aware that the sell would occasion loss to NSSF on one hand but would get the full value upon maturity in just a few days from the date of sale.

We agree with the holding of the learned trial judge that the variance between the price obtained by the NSSF upon the sale of the bonds before their maturity date and their guaranteed price upon maturity constituted loss. Financial loss is not defined by any law as far we could ascertain...

We find that NSSF was by the act of the appellant deprived of the money the bonds would have fetched upon maturity and we hold so.

Unlike the offence of Abuse Office, the offence of causing financial loss does not have to result from an arbitrary act. there was no duty therefore to prove that the appellant had acted against any established policy or regulation or that he had acted arbitrarily. The offence was sufficiently proved when evidence was adduced to prove that the appellant knew or had reason to believe that this act would cause financial loss to his employer a public body.

The appellant attempted to show in his defence that the money realised from the sale of the bonds was invested elsewhere and that it yielded profit. We are not the least convinced by that argument. There was no evidence to suggest that such investment could not have waited until the maturity date of the bonds. Had the appellant

waited until the bonds matured, he would still have invested that money the way he said he did and at that time more money would have been available to him to invest. Even with that investment, NSSF still made a loss as it would have raised more money from those investments had the appellant not rushed to sell the bonds before their maturity date.

We agree with learned trial judge that offence of causing financial loss was sufficiently proved against the appellant.

We find that the learned trial judge properly evaluated the evidence and came to correct conclusion."

The position of the law is that a second appellate Court faced with the concurrent findings by the two Courts below is not expected to re-evaluate the evidence or question the concurrent findings of the High Court and Court of Appeal unless it is shown that they did not evaluate or re-evaluate the evidence or they are proved manifestly wrong on findings of fact. See **Areet Sam Vs Uganda, Supreme Court Criminal Appeal No 20 of 2005)**

We have no doubt in our minds that the first appellate court on the re-evaluation of the evidence was satisfied that the offence of financial loss had been proved beyond reasonable doubt. Not a single piece of the evidence so evaluated has been faulted before us and there is ample evidence to justify the conviction. We find no valid reason to depart from their findings.

Ground one and two fail.

Ground 3, Counsel for the appellant argued that the learned Justices of Appeal did not consider the appellant's submissions in respect to severity of the sentence. He said that the Court of Appeal erred in law when it confirmed the sentence of 12 years imprisonment, convicted the appellant for abuse of office and sentenced appellant to 4 years imprisonment. Counsel submitted that the appellant's sentence of 12 years imprisonment for causing financial loss was extremely harsh and excessive.

Counsel for the respondent on the other hand submitted that the Court of Appeal was right to observe that the appellant's sentence was legal and it was below the maximum by two years under section 20 of the Anti-Corruption Act. Counsel further contended that the ground of severity of the sentence was not addressed by the Court of Appeal. He prayed that this court dismisses this ground.

Court's Determination.

Ground 3 has two limbs, the first being the legality of the appellant's sentences imposed and confirmed by the Court of Appeal and the second being the severity of the sentence imposed by the trial court.

Section5(3) of the Judicature Act provides:

"In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order, on a matter of law, not including the severity of the sentence."

It is now trite law that this court will not entertain a ground of appeal based on the severity of the sentence.

In the case of **Abelle Asuman Vs Uganda (Supreme Court Criminal Appeal No.66 of 2016)** it was held as follows: -

"The sentence being harsh and excessive are matters that raise the severity of the sentence.

This Court held in **Criminal Appeal No.34 of 2014, Okello Geoffrey vs. Uganda** as follows:

> **"... Section 5(3) of the Judicature Act does not allow an appellant to appeal to this Court on severity of sentence. It only allows him or her to appeal against sentence only on a matter of law.**

Accordingly, we shall not consider issues of the sentence being harsh or excessive since that goes to severity of sentence. The appellant has no right of appeal on severity of sentence."

We shall not address the second limb of ground 3 as this is not allowed for by Section 5(3) of the Judicature Act and the Court of Appeal correctly ignored to address the same.

The first limb is on the legality of the sentences imposed and confirmed by the Court of Appeal, which we shall address. This court has in several cases set criteria to be followed before it can interfere with the discretion of a sentencing court in arriving at the sentence being appealed against.

In the case of **Kizito Senkula vs Uganda (Supreme Court Criminal Appeal No.24 of 2001)** this court held as follows: -

"As we have already mentioned the appellant appealed against the sentence to the Court of Appeal. In dismissing that appeal, the Court of Appeal, rightly in our view, followed the principle in *Ogalo s/o Owuora - vs- R (1954) 24 EACA 270,* which is that in exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James -vs- R (1950) 18 EACA 147,* it is evident that the judge has acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."

On the issue of sentencing, the Court of Appeal observed as follows:-

"The sentence of 12 years imprisonment for the offence of causing financial loss is perfectly legal and we hold so...

We now sentence the appellant to 4 years imprisonment on count one to run concurrently with the 12 years sentence imposed by the trial court on count two which we have already upheld."

In the case of **Ssekitoleko Yudah and Others vs. Uganda, SCCA No. 33 of 2014** this court held as follows: -

"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive so as to amount to an injustice." See also **Ogalo s/o Owuora v. R (1954) 21 EACA 270** and **R v. Mohamedali Jamal (1948) 15 EACA 126**.

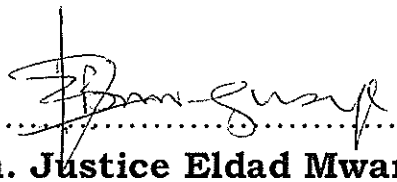
We find the appellant's sentence of 12 years imprisonment for causing financial loss contrary to section 20 of the Anti-Corruption Act imposed by the trial court and confirmed by the Court of Appeal a legal sentence. We find no reason to interfere with it. After re-evaluation of the mitigating factors for the appellant, we find that the Court of Appeal legally sentenced the appellant to 4 years imprisonment for the offence of abuse of office.

As a result, having found that all the grounds of appeal fail, this appeal is hereby dismissed. We uphold the decision of the Court of Appeal.

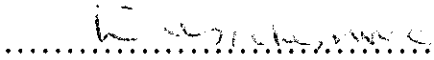
Dated this .....day of .....2019.

.....

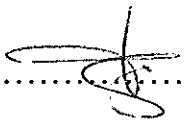
Hon. Justice Dr. Esther Kitimbo Kisaakye
Justice of the Supreme Court



Hon. Justice Eldad Mwangusya
Justice of the Supreme Court



Hon. Justice Prof. Lillian Tibatemwa-Ekirikubinza
Justice of the Supreme Court



Hon. Justice Paul Mugamba
Justice of the Supreme Court

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Hon. Justice Jotham Tumwesigye
AG. Justice of the Supreme Court